

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: December 2, 2014

TO: Margaret Diaz, Regional Director
Region 12

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Florida Gaming Centers, Inc.
d/b/a Miami Jai-Alai
Case 12-CA-131380

530-6067-4033-2900
596-0420-5050-0000

This case presents the issue of whether an employer that sold all of its assets pursuant to a “free and clear” sale in bankruptcy court violated Section 8(a)(5) by announcing its intent to change terms and conditions of employment that would not accrue until several months after the employer was to cease operating. We conclude that the employer did not violate Section 8(a)(5) under these circumstances. Moreover, even if the unilateral change allegation was meritorious, it would not effectuate the purposes and policies of the Act to issue complaint, because the employer is no longer operating and no longer employs the affected unit employees; the union has withdrawn its administrative claim in bankruptcy court against the employer; and the union has withdrawn its identical unilateral change allegation against the putative successor/asset purchaser, which is the company that implemented the change at issue and currently employs the affected employees. Accordingly, the Region should dismiss the charge, absent withdrawal.

Florida Gaming Centers, Inc. d/b/a Miami Jai Alai (“FGC”) operated a casino and jai alai facility in Miami, Florida until April 30, 2014. FGC employed 36 jai alai players, who were represented by the International Jai Alai Players Association, UAW Local 8868 (“Union”). FGC and the Union were parties to a collective-bargaining agreement with an expiration date of December 31, 2014. FGC had a longstanding practice of reimbursing the annual airfare costs that its foreign players incurred when traveling to their home countries during the summer break period in order to renew their visas.

Around 2012, FGC defaulted on a \$100 million loan with ABC Funding, and ABC Funding sought to foreclose on FGC’s property. In late November 2012, upon the agreement of ABC Funding and FGC, a Florida state circuit court appointed an

individual affiliated with ABC Funding as a receiver (“Receiver”).¹ On August 29, 2013, FGC filed a voluntary petition for bankruptcy,² and in late November 2013, it filed a motion to sell substantially all of its assets “free and clear” of all liabilities. On December 30, 2013, the bankruptcy court authorized procedures for the auction of FGC’s assets. In March 2014,³ Fronton Holdings, LLC—an entity related to ABC Funding—filed a proposed asset purchase agreement to purchase FGC’s assets in a “free and clear” sale, which the bankruptcy court approved. On April 7, the bankruptcy court entered an order providing, *inter alia*, that Fronton was purchasing FGC’s assets “free and clear of all liabilities,” that the sale of assets would close on April 30, that Fronton would begin operations on May 1, and that Fronton was assuming FGC’s collective-bargaining agreement and the 36 players’ individual contracts.

On April 9, shortly after the “free and clear” sale order issued, FGC’s Director of Jai-Alai Operations announced to the players that there were going to be many changes, including eliminating the airfare reimbursement for the foreign players who traveled to renew their work visas each summer. He told employees that the Receiver had directed him to make the announcement on Fronton’s behalf.⁴

The Union filed a grievance against FGC on April 11, alleging that FGC’s announcement was an unlawful unilateral change to the parties’ past practice, but the parties did not resolve the issue before FGC ceased operations on April 30. The Union president forwarded the unresolved grievance to Fronton on May 2. The Union also filed separate unfair labor practice charges against FGC and Fronton, the putative successor, alleging that they had violated the Act by unilaterally changing FGC’s past practice of reimbursing the players’ airfare costs.⁵ The twelve foreign players traveled to their home countries during the summer to renew their visas, and Fronton refused to reimburse the airfare.

¹ The receivership appointment gave the Receiver the authority to protect FGC’s assets in order to protect the creditors’ investments, but there is no evidence that the receivership appointment permitted him to run the company’s day-to-day business activities or control its labor relations matters.

² See *In re Florida Gaming Centers, Inc.*, Ch. 11, Case No. 13-29597-RAM (Bankr. S.D. Fl. 2013).

³ All dates hereinafter are in 2014 unless otherwise indicated.

⁴ The Receiver is currently the President and CEO of Fronton and held that position when Fronton ultimately assumed operations on May 1.

⁵ The charge against Fronton was in Case 12-CA-126884.

The Region originally submitted this case for advice on whether either FGC or Fronton violated the Act by unilaterally changing the parties' past practice. In October or November, while Advice was processing these cases, the Union entered into a settlement agreement with Fronton and withdrew the charge against it. The Union also withdrew its administrative claim in bankruptcy against FGC, which the Union had filed in order to recoup expenses from FGC if the Board ultimately found that FGC was liable for reimbursing the players' airfare. The Union and Fronton have refused to provide the Region with a copy of their non-Board settlement agreement, but the Union has informed the Region that the agreement resolved several pending grievances, resulted in a new three-year collective-bargaining agreement, and required the Union to withdraw its administrative claim for expenses in the FGC bankruptcy case.

We conclude that FGC did not violate the Act by announcing that foreign players would no longer be reimbursed for the airfare costs that they would incur while traveling to renew their work visas. FGC's mere announcement of a future intent to unilaterally cease reimbursing the foreign players for their airfare was not an unlawful unilateral change.⁶ Moreover, any obligation to reimburse employees would not arise until the late summer, several months after Fronton was scheduled to take over. Indeed, FGC even stated that the announcement had been directed by the Receiver on Fronton's behalf. In these circumstances, we construe FGC's communication as announcing *Fronton's* intent to make a future change, which was not an unlawful unilateral change by FGC to the parties' past practice.

Further, even if the allegation against FGC was meritorious, issuing complaint here would not effectuate the purposes and policies of the Act. FGC sold all of its assets in order to satisfy debts to its creditors and is no longer operating. The Union withdrew its administrative claim in the bankruptcy proceeding, which was its only means of recouping any monetary remedy from FGC. Although the Agency could file a claim in the bankruptcy proceeding as an unsecured creditor, it would only be able to potentially recoup a very small portion of any monetary obligation that FGC owed

⁶ Cf. *Howard Electric & Mechanical*, 293 NLRB 472, 475 (1989) (notice of an intent to commit an unlawful unilateral implementation does not trigger the 10(b) period as to the unlawful act itself), *enforced*, 931 F.2d 63 (10th Cir. 1991) (table decision). See also *Leach Corp.*, 312 NLRB 990, 991 (1993) (it is well established that a "statement of intent or threat to commit an unfair labor practice does not start the statutory six months running") (quoting *NLRB v. Al Bryant, Inc.*, 744 F.2d 543, 547 (3d Cir. 1983)), *enforced*, 54 F.3d 802 (D.C. Cir. 1995); *Newark Morning Ledger Co.*, 311 NLRB 1254, 1256 (1993) (employer's communication to union that it intended to unilaterally institute physical exams for employees did not cause the 10(b) period to begin; statute only began to run when employer actually began requiring the exams).

to the players.⁷ Additionally, the Union withdrew its ULP charge against Fronton, which is the company that implemented the change and currently employs the affected players. Under these circumstances, it would not effectuate the purposes and policies of the Act to litigate an unfair labor practice allegation against FGC and file a claim in the bankruptcy proceeding.

Based on the foregoing, the Region should dismiss the charge, absent withdrawal.

/s/
B.J.K.

See NLRB v. Nathanson, 344 U.S. 25, 29 (1952) (finding that Board backpay order has no priority over any other wage claim in bankruptcy proceedings); *NLRB v. Deena Artware, Inc.*, 207 F.2d 798, 801 (6th Cir. 1953) (Board claim to backpay is considered that of an unsecured creditor).